ONTARIO HUMAN RIGHTS CODE
R.S.O. 1990. c. H.19

BOARD OF INQUIRY

BETWEEN:

AB

Complainant

- and -

ONTARIO HUMAN RIGHTS COMMISSION

Commission

- and -

JEROME COLLOREDO-MANSFELD,
SARAH EILEEN CLARKE and CHRIS CLARK

Respondents

DECISION

BOARD OF INQUIRY: Ronald W. McInnes

APPEARANCES:	Naomi Overend	Counsel for the Ontario Human Rights Commission
	Russell Armstrong AB	Counsel for the Complainant (to Sept. 2/93) On his own behalf (from May 16/94)
	Arthur S. Pollack	Counsel for the Respondents

DATES OF HEARING April 22, 1993;
June 21, 1993;
August 30 and 31, 1993;
September 2, 1993;
May 16, 1994;
June 6, 8, 9 and 10, 1994

PLACE OF HEARING Toronto, Ontario

The complainant, AB, is a francophone. He was born and raised in the Province of Québec. He is also gay and, during most of the relevant period, resided with his roommate, CD, in apartment 304 in an apartment building in Toronto.

The apartment building is owned by Jerome Colloredo-Mansfeld together with his niece, Christina Colloredo-Mansfeld. He resides in Austria. Sarah Eileen Clarke is the admitted superintendent of the apartment building although she is now over ninety years old. Chris Clark is her son, having changed the spelling of his name for business reasons. He resides in the apartment building in apartment 204, immediately below AB's apartment, and is alleged to have performed at least some of the duties of a superintendent in the building. Both Mr. Colloredo-Mansfeld and Mr. Clark are gay.

By Complaint dated January 19, 1990, AB alleged discrimination in accommodation on the basis of ancestry, place of origin, ethnic origin and reprisal against Mr. Colloredo-Mansfeld, Mrs. Clarke and Mr. Clark.

By letter dated March 24, 1993, I was appointed by the Minister of Citizenship to constitute a board of inquiry to hear this Complaint.

PRELIMINARY MATTERS

This hearing commenced by conference call on April 22, 1993.

The first day of the hearing was June 21, 1993 which date was set aside for the hearing of a preliminary motion by counsel for the respondents that the matters complained of were *res judicata* by reason of the decision of His Honour Judge B.M. Kelly given September 25, 1990 in the case of *R. v Chris Clark and Jerome Colloredo-Mansfield*. My reasons for dismissing this motion are dated July 13, 1993.

At the recommencement of the hearing on August 30, 1993, counsel for the Ontario Human Rights Commission (the "Commission") announced that she would be leading evidence as to discrimination based on sexual orientation as well as the grounds set out in the Complaint. She referred to section 39(1) of the *Human Rights Code*, R.S.O. 1990, c. H-19 (the "*Code* ") as authority for my considering such evidence. That section provides, in part,

> "39.(1) The board of inquiry shall hold a hearing,
>
> (a) to determine whether a right of the complainant under this Act has been infringed;"

I agree that my function is to inquire into discriminatory actions against the complainant by the respondents and that I am not limited strictly to the grounds set out in the initial complaint. The issue of sexual orientation had been raised during the investigation of this Complaint and there was no indication that the respondents were caught by surprise. Although counsel for the respondents objected vigorously to this evidence, there was no request for an adjournment. I ruled that the evidence was admissible.

Commission counsel also asked for a publication ban on the names of the complainant and his roommate. This request was based on the fact that the

sexual orientation of the roommate was not known in his workplace and could have an adverse effect on his ability to carry out the duties of his employment. She further submitted that publication of the complainant's name would serve to identify the roommate. Counsel for the respondents objected strenuously although he did not argue that there would be any prejudice to the respondents. I took this request under advisement and issued an interim order banning publication of the names of the complainant and his roommate or any information which would have the effect of identifying them to the general public. When I asked for further submissions later in the hearing, counsel for the respondents indicated that he was no longer objecting to the publication ban and, consequently, the interim order in this regard was made final. In making this order, I adopted the reasoning in *A. v. Quality Inn* (1993), 20 C.H.R.R. D/230 and the cases referred to in that decision.

I would comment, however, that these two matters should have been raised during the initial conference call or, at the very least, with some advance notice to both the tribunal and counsel for the respondents.

After two days of evidence had been heard, counsel for the respondents brought a motion asking that I disqualify myself by reason of conflict of interest and reasonable apprehension of bias. My reasons for dismissing this motion are dated October 21, 1993.

THE EVIDENCE

AB and his roommate moved into the apartment building in August, 1985. Initially, they occupied a small apartment reserved for the use of Mr. Colloredo-Mansfeld. AB testified that he was a friend of Mr. Colloredo-Mansfeld and that Mr. Colloredo-Mansfeld had stayed with him for a time when he lived in Montreal. In February, 1986, AB and his roommate vacated this apartment, apparently because it was required by Mr. Colloredo-Mansfeld. Very shortly thereafter, they moved into apartment 304 which was offered to them by Mrs. Clarke when their plans to move elsewhere fell through. They maintained the tenancy of this apartment until December, 1993 when they vacated pursuant to the terms of a settlement. During part of this period, the apartment was sublet to others.

Although the case was presented on the basis that the problems originated with an incident involving a cheque in November 1988, there was some evidence of events prior to that date. In 1986, there had been comments by Mrs. Clarke with respect to AB's use of French on his answering machine and writing cheques in French. At this time, AB contacted Mr. Colloredo-Mansfeld who wrote back to AB, by letter dated September 24, 1986, stating that he had advised Mrs. Clarke to accept the cheques but that he would decline to follow AB's advice that she should be dismissed.

In addition, two cheques for the rent for April and May 1987 were introduced into evidence. These cheques were post-dated and an attempt had been

made to negotiate them prior to their date. In addition, the amounts of the cheques and, in one case, the date of the cheque had been altered. Consequently, they were returned by the bank.

Also put into evidence was the transcript of the trial in *R. v David Wharton* held February 18, 1988. The accused, who was a tenant of the building at the time, was convicted of an assault on Mr. Clark. AB testified for the prosecution. Mr. Clark testified in these proceedings that he was the superintendent of the apartment building.

In November 1988, Mrs. Clarke refused a cheque written in French by AB and left the following message on his answering machine:

> "I'm Mrs. Clark and I'm not accepting your cheque. I just phoned the Rental Board and they said no, I can refuse your cheque 'cause you're not talking, you're discriminating my English language, and I wanted the cheque from Mr. [CD]. All my cheques are in but yours. So I'm not accepting your cheque in French (?) from you either, and there will be no games played." [as transcribed by Mark J. Nimigan, C.S.R., Official Examiner]

AB testified that he had written the rent cheques for September and October in French and these had been accepted without incident. AB gave evidence that the arrangement between him and CD was that they would alternate paying the rent on an annual basis and that CD had been delivering his cheques for the year ending in August 1988.

AB's evidence was that he then spoke to Chris Clark who told him that, in addition to the problem of the cheque being in French which his mother could not understand, the apartment was registered in CD's name with the "Rental Board" and that, in the past, some cheques from AB had bounced. AB believed that these latter two reasons were "invented" and that this was a "declaration of war" over his right to write a cheque in French. He also stated in his testimony:

> "There was an implied threat of eviction by telling me that not only was it because of the cheque, but because the apartment was not in my name. It was like an implied eviction. I was already evicted. I was not considered a tenant suddenly."

At this time, AB visited the offices of the Rental Board and determined that apartments were not registered in the names of individual tenants as maintained by Mrs. Clarke and Mr. Clark.

On November 7, 1988 AB wrote to Mr. Clark setting out his position with respect to the cheques in some detail and stating "I regard any refusal to cash my cheques written in French as pure DISCRIMINATION ..." and that he had consulted the proper authorities on the matter. It is a reasonable inference from the letter that this included the Ontario Human Rights Commission although there is no indication that any complaint was made at this time. With the letter, he enclosed some materials with respect to proper procedures under the *Landlord and Tenant Act* and indicated that he was pursuing further inquiries with the Rental Board with respect to a full rental history of the building. The letter was copied to Mr. Colloredo-Mansfeld as well as to all tenants in the building and Mr. David

Wharton (the accused in the earlier assault trial and, apparently, no longer a tenant of the building). In the letter, AB stated:

> "...I feel concerned. Not for the relative insignificance of a cheque written in French and valid in all cases but for the other extensions of harassment and discrimination that have just now been all and fully revealed to me by other tenants."

On November 8, 1988 AB wrote a further letter to Mrs. Clarke and Mr. Clark formally complaining of "incorrect management practices under the Landlord and Tenant Act" and requesting reimbursement for overpayment of rent, based on the information he had received from the Rental Board offices. This letter was also copied to Mr. Colloredo-Mansfeld and apparently sent to the Rent Review Board together with an application requesting a reimbursement of excess rent.

The foregoing letters and documents were distributed by AB to all of the tenants of the building together with a further five page letter setting out information and procedures with respect to calculation of legal rent, eviction procedures and discrimination.

AB testified that he believed that he first met with someone from the Ontario Human Rights Commission in the first or second week of November, 1988.

On November 19, 1988 AB wrote to the accountants for the building in their capacity as "legal representatives" acting on behalf of the landlord. In this letter, he again set out at considerable length what he regarded as the illegal actions

and harassment tactics engaged in by Mrs. Clarke and Mr. Clark with respect to illegal evictions and unlawful rent charges. AB states in this letter:

> "It is not the relatively insipid affair of my November 88 cheque written as usual in French that has still not been cashed that worries me, but the whole rental situation."

On cross-examination, AB was asked about his allegations in the letter of November 19, 1988 to the accountants with respect to racial discrimination. He gave, as an example, the situation of Gregory Zarzycki who had been threatened with eviction and was of Polish ancestry.

On or about November 21, 1988 AB contacted the Ontario Human Rights Commission. On December 2, the Commission wrote to the accountants for the building asking for their response to AB's allegations that he had been discriminated against because he was originally from Québec and speaks French and, specifically, because he used French on his telephone answering machine and wrote rent cheques in French.

In the meantime, the rent cheque was cashed sometime in the latter part of November. Subsequent cheques were cashed and there was no further evidence of any problem in this regard until the end of 1989.

Because of the nature of their occupations, both Mr. Clark and AB worked in their apartments on a fairly regular basis. Both also played the piano.

The next incident concerned noise. Sometime during this period, AB began noticing a banging noise apparently coming from Mr. Clark's apartment every time he sat down to play the piano. This was variously characterized as banging on the ceiling or hitting plumbing pipes with a hammer. Mr. Clark's evidence was that, during this period, AB was aggravating him and disturbing his work by playing the piano for long periods during the day but repetitiously over the same passage. However, he denied banging on anything to give notice of his irritation.

On January 25, 1989 Mr. Clark telephoned the police complaining of noise in AB's apartment at 7:23 p.m. When the police arrived, all was apparently quiet and only CD was at home. It was AB's evidence that he had left the apartment earlier in the evening to play in a volleyball tournament. He admitted that he had played the piano for possibly an hour and a half that day but denied that he was repeating passages or playing in a manner intended to aggravate Mr. Clark.

On February 28, 1989 AB and CD received a notice of termination in which the particulars stated that "the tenant(s) plays the piano at all hours disturbing other tenants. The tenant(s) interferes with the duties of the agent of the landlord in the day-to-day management of the building". This was notice to deliver up vacant possession on April 30, 1989 but no further proceedings were taken.

With respect to these events, AB testified:

> " ... so [CD] and I were very nervous about this. Especially that we knew about the pattern as to how they evicted people, and we

> suspected that sooner or later we'd get a plumbing problem somewhere coming up."

In March and April, 1989 there were a series of incidents involving plumbing repairs. Mrs. Clarke sought entry to their apartment to inspect the plumbing and to fix an alleged leak. AB and CD countered by hiring a plumber to inspect the plumbing. He advised them that there was no leaking in their apartment. They also called in a building inspector who apparently recommended that any repairs should be made from inside Mr. Clark's apartment. In any event, permission was given on several occasions for Mrs. Clarke to enter the apartment with a plumber but only when one of the tenants was present. On a couple of occasions, AB felt it necessary to summon CD to return to the apartment from out of town in order to be present. Sometimes, Mrs. Clarke cancelled the proposed inspection. In his evidence, AB questioned whether the person with Mrs. Clarke on one occasion was really a plumber. In the end, only one minor repair was performed.

At about this same time, Mr. Clark swore an information before a Justice of the Peace charging AB with watching and besetting in interfering with his activities and duties in and around the apartment building. The trial was eventually held on September 19, 1989. In these proceedings, Mr. Clark testified that he was doing his mother a favour by changing light bulbs, clearing snow and putting out garbage. AB was acquitted.

Considerable evidence was given with respect to an incident involving AB's bicycle. AB had been keeping it in one of the garages in the building for some period of time. On July 15, 1989 Mrs. Clarke removed his bicycle from the garage and told him that it could not be stored there any longer. A rather nasty verbal altercation ensued during which AB testified that Mrs. Clarke called him a "bum", "fairy" and "dirty homosexual" within the hearing of other people. Shortly after this incident, AB discovered that a nail had been hammered through the back rim of his bicycle.

AB testified that some time in November, 1989 Mr. Clark put in a very loud sound system in his apartment and began playing music with a pounding beat. This disturbed AB who was working at home doing research. He telephoned the Noise Complaint Bureau of the City of Toronto and was advised to keep a diary. He also complained of other noises which sounded like banging on the ceiling and opening and closing water pipes to make noise. On November 8, 1989 AB telephoned the police and an officer came to the building and went to Mr. Clark's apartment to investigate. By this time, AB had "flown into a rage" and was stomping heavily back and forth in his apartment. This was the only noise which the officer heard.

In October, 1989 both AB and CD received letters from the solicitor for the landlord advising them that Mrs. Colloredo-Mansfeld's son would be arriving in Canada on January 1, 1990 to manage the apartment building and that he required their apartment. This was followed with a notice of termination pursuant to the

Landlord and Tenant Act dated October 30, 1989 giving notice to deliver up vacant possession on December 31, 1989. No further action was taken with respect to this notice.

CD testified that the rent cheque for January, 1990 which was written in French by AB was refused. AB was on assignment in Europe at the time. However, there is no evidence to suggest that this cheque was returned because it was written in French and it should be noted that it represented payment for the month after the date on the termination notice. CD obtained the bank account number for the landlord from an earlier cancelled cheque and began directly depositing the rent after advising Mrs. Clarke in writing that this is what he would be doing.

On January 19, 1990 AB signed the formal Complaint pursuant to the *Code*.

Subsequently a charge was laid by AB against Chris Clark and Jerome Colloredo-Mansfeld that Mr. Clark substantially interfered with the reasonable enjoyment of the premises by the tenant, AB, contrary to the *Landlord and Tenant Act*. This trial was held on September 25, 1990. Mr. Clark testified that he was not a "landlord" within the meaning of the *Landlord and Tenant Act*. He was acquitted of the charge.

AB testified that, during the following year, Mr. Clark called him a "faggot" on several occasions in the building and in the parking lot and also called

him the "Queen of France" at a bus stop on Queen Street. He testified that Mr. Clark "played games" with the water in his apartment to affect the temperature of the shower in AB's apartment. Mr. Clark also parked his car under the open window to AB's apartment with the engine running so that exhaust fumes would go through the open window of the apartment. This occurred in summer as well as winter and, afterward, Mr. Clark often just drove around the block and returned his vehicle to the parking lot.

From August, 1991 until the summer of 1992, AB was teaching in France. It was the position of the complainant and the Commission that various incidents of harassment directed at CD during this time constituted harassment of AB. This applied particularly to attempts to evict CD and, therefore, AB from the apartment.

There was evidence that, during this period, CD received letters from the solicitor for the landlord stating that CD was not and had never been the tenant of the apartment. Locks were apparently changed twice by either Mr. Clark or Mrs. Clarke. They refused to accept CD's payment of the rent on certain occasions and there was testimony that Mrs. Clarke telephoned AB in France asking him for the rent money.

During much of this period, neither AB nor CD was living in the apartment. AB was teaching in France and CD was living in another residence which he owned and which was closer to his work. During this time, the apartment

was sublet to a Ms. Borsanyi from approximately September 1991 to January 1993. She moved out of the apartment in order to take another apartment in the building on a permanent basis. It was then sublet to a Ms. Sarazin for about three months. Both of these women were described as being French Canadian

When Ms. Sarazin moved out, CD attempted to re-occupy the apartment alone as AB was still in Europe. During this period, he apparently misplaced AB's bank card which he had been using to deposit money to AB's account to cover post-dated rent cheques. He testified that he couriered his own cheques for July and August rent to Mrs. Clarke but they were returned marked "refused". He then found the locks on the door to the apartment had been changed He brought an application in his own name for a writ of possession of apartment 304; in essence, a declaration that he was a tenant of the premises. This trial was held on December 20, 1993 and CD's application was granted. In these proceedings, Mr. Clark testified that he had never been anything more than a tenant in the building.

CD testified that, in the course of serving papers on Mrs. Clarke in these proceedings, she, on one occasion, turned the garden hose on him and, on another occasion, made derogatory comments about his sexual preferences, spit at him and threw things at him.

There was also a criminal charge arising out of the changing of the locks on the apartment. It was heard on December 21, 1993 at which time Mrs. Clarke, through her counsel, pleaded guilty to illegally changing the locks.

AB and CD vacated the apartment at the end of December 1993 pursuant to a settlement with the landlord.

Evidence was given as to one further quasi-judicial proceeding involving the parties. This was the matter of *Re Lois Starr and other tenants v Jerome Colloredo-Mansfeld* which resulted in an Order under the *Rent Control Act* dated May 25, 1994. The Rent Officer made a finding as to maximum rents chargeable and ordered a small rebate with respect to maintenance. Evidence was given by Mr. Clark that he was employed by Mr. Colloredo-Mansfeld and received $450.00 per month to clean the halls, cut the grass, remove snow and change light bulbs. CD took an active role in the proceedings.

Gregory Zarzycki was brought from British Columbia to testify. He made no reference in his evidence to feeling that he had been discriminated on the basis of race or ancestry but did testify that he experienced many of the same problems as did AB and CD. He testified that the dates on some of his post-dated cheques were changed resulting in the cheques being returned NSF. He testified that he too received eviction notices including one stating that the son of Mrs. Colloredo-Mansfeld would be moving into the building and required his apartment.

Mr. Zarzycki also testified that, on one occasion, he was present in AB's apartment and heard loud pounding music coming from the apartment below. In his opinion, it was being played in such a manner as to be deliberately disturbing.

The occupant of a neighbouring house, Lorraine Van Santen was called as a witness by the Commission. She testified primarily as to the bicycle incident which she overheard from her home and corroborated much of the complainant's evidence. She also testified that she had a discussion with Mrs. Clarke shortly after at which time Mrs. Clarke said that AB and CD were giving her "nothing but trouble" and that she had been trying to get them out. During this conversation, Mrs. Clarke stated that she was not going to have "any dirty little homosexuals" living in her building.

Ms. Van Santen also testified that Mr. Clark referred to AB as a "frog" and "fag" on some occasions. She stated that she had heard loud noise coming from a stereo which she thought was in Mr. Clark's apartment and also saw Mr. Clark park his car beneath the window to apartment 304 and leave it running there for several minutes.

The final witness for the Commission was Lois Starr. She has been a tenant in the building since 1986. She is the sister of the previous witness, Ms. Van Santen. Ms. Starr initiated the rent control application which resulted in the decision dated May 25, 1994.

She testified that she initially had a friendly relationship with Mr. Clark and Mrs. Clarke but that it had been deteriorating since about September, 1991. This evidence was tendered by the Commission as similar fact evidence of the treatment of tenants by Mr. Clark and Mrs. Clarke.

For the respondents, Mrs. Clarke testified that she did not learn French at school and did not understand the language. She stated that she refused the cheque written in French tendered by AB because she could not read it. She testified that she asked AB to give her one in English and that he refused.

She denied making any derogatory comments about AB being French or a French Canadian. She stated that she was aware that AB and CD were homosexual but did not care. She testified that depositing the post-dated rent cheques prior to their date was an error on her part. She stated that she did not look at the dates. However, she denied making any alterations to the cheques.

She explained that Mrs. Colloredo-Mansfeld's son had intended to come over to manage the apartment building. However, his grandfather died at about the time he was to come and these plans were never followed through. She stated that he initially wanted apartment 304 but then changed his mind. She testified that she just put this in the hands of the lawyer and had very little to do with it. She could not remember why the termination notice based on noise was not proceeded with.

With respect to the bicycle incident, she stated that the garage was rented to a Mr. Costa and that he wanted the bicycles out. She denied calling AB a "dirty homosexual". However, she did admit turning the hose on CD when he refused to leave her property.

Mr. Clark testified that he has lived in the apartment building since 1988. Over that time, there have been about 6 to 8 tenants from Québec and there had been no problems involving them. He stated that he had no problem with respect to AB's ancestry. He stated that he was not involved in the incident of the cheque written in French. He further denied making any derogatory comments about AB being of French Canadian background and stated that he never used the term "frog". He also denied using the other derogatory epithets attributed to him.

He explained that he never took over management of the apartment building although this was considered at one point. He still regarded his mother as managing the building although he admitted that she was no longer being paid for this by the owners. He attributed his seemingly contradictory testimony in this regard in various legal proceedings to changes in plans and misunderstandings with his mother. In one case, he blamed it on the fact that his lawyer was not present.

Generally, the evidence of these two respondents amounted to an outright denial of most of the allegations of the complainant and lack of knowledge of others. With respect to the remaining allegations, the testimony of the

respondents placed the blame on the complainant and his roommate as being the instigators of the problems.

Christina Colloredo-Mansfeld was not made a party to these proceedings. Jerome Colloredo-Mansfeld did not attend personally at the hearing. Apart from the inferences to be drawn from his ownership of the apartment building, the only evidence linking him with the events complained of was his failure to respond to the complainant's letters in November 1988 or to subsequent correspondence and telephone calls referred to in the complainant's evidence and a letter dated December 27, 1988 written to Mr. Clark in which he states in reference to AB:

> "But beeing aware of his psychotic mind we must never loose our temper when talking with him. One has to face him with utter coolness and for the rest try to avoid him completely. And we have to try to get rid of him at the next best occasion."

Despite its length, this is a brief summary of the evidence at the hearing. The complainant, in particular, and his roommate went into minute detail on every incident and introduced as exhibits numerous transcripts, documents, letters, postcards, registered mail receipts, notes, telephone bills, invoices, copies of cheques and bank records, etc. dating back to 1986, much of which was of only marginal assistance.

ANALYSIS

The law is clear that the onus is on the complainant to establish a *prima facie* case of discrimination. It is also clear law that, where there are or may be a number of reasons for the actions complained of only one of which is a prohibited ground, the presence of that prohibited ground is sufficient to constitute a violation of the *Code* provided that it is a proximate cause. Accordingly, the complainant must establish a *prima facie* case that the proximate cause of the actions complained of was a prohibited ground under the *Code*.

This Complaint is brought under the following sections of the *Code*:

> "2(1). Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.
>
> 2(2). Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status, handicap or the receipt of public assistance."
>
> ...
>
> "8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part."

The bulk of the evidence presented by the Commission and the complainant was directed at the complaint of harassment. The theory was that the scenario began in November 1988 with the refusal to accept the cheque written in French and everything followed from that event. It was submitted that this constituted harassment with respect to accommodation because of ancestry. At some undefined point, the reason for the harassment began to include sexual orientation as well.

Section 2(2) of the *Code* deals specifically with harassment in accommodation. Sexual orientation is not listed as a prohibited ground in that subsection. I have been unable to determine any reason for this omission. There appears to have been no discussion of inclusion or exclusion in this subsection when the *Code* was amended to add sexual orientation as a prohibited ground of discrimination. There is a similar omission in section 5(2) which deals with harassment in employment.

Counsel for the Commission argued that conduct which is serious enough to be a violation of section 2(2) would also, in itself, constitute a discriminatory practice under section 2(1) and that section 2(2), although providing greater certainty, really adds little, if anything, to the *Code*. As an alternative, she submitted that the type of harassment in this case, entered into with the intent of forcing the complainant to move from the building, was serious enough to constitute a contravention of section 2(1).

There is a suggestion in Keene, *Human Rights in Ontario*, 2nd edition, page 233, fn. 31 that such conduct may be covered by section 7(1) which deals with harassment in accommodation because of sex:

> "Some of the remarks of the board in *Shaw* [*Shaw v Levac Supply Ltd.* (1990), 14 C.H.R.R. D/36] give rise to speculation as to whether the concept of sexual harassment, as developed to date, might extend to situations in which harassment in employment or accommodation is inflicted because of the perceived sexual orientation, of the victim. Central to this argument is the understanding that, at base people are harassed because of their sexual orientation because the harasser does not think the victim behaves sexually as a man or woman ought to behave."

This approach appears to have been adopted in the recent unreported decision of a board of inquiry in *Crozier v Asselstine* dated October 3, 1994. This case dealt with a complaint of sexual harassment in the workplace as well as discrimination in employment because of sexual orientation. The respondent apparently discovered that the complainant was a lesbian and initiated an unwelcome campaign to persuade her of the advantages of having a heterosexual relationship with him. The tribunal found that the respondent's conduct amounted to harassment because of sexual orientation as well as sexual harassment and then cited the reasoning of the Supreme Court of Canada in *Janzen v Platy Enterprises Ltd..*, [1989] 1 S.C.R. 1252 as supporting the conclusion that harassment for sexual orientation equals discrimination for sexual orientation.

In my opinion, to follow this line of reasoning would deprive section 2(2) of the *Code* of any meaning. Following the direction of the Supreme Court of

Canada in *Canada (Attorney General) v Mossop* (1993), 17 C.H.R.R. D/349 at D/362, this case must be dealt with, in the absence of a constitutional challenge, on the basis of the legislation as it is presently written. Sexual orientation cannot be read, directly or indirectly, into the prohibited grounds set out in section 2(2). I will consider the evidence with respect to harassment because of sexual orientation solely in the context of section 2(1).

I am prepared to accept that discrimination based on the use of the French language falls within the proscription in relation to ancestry. The only case cited on this point was *Cousens v the Canadian Nurses Association* (1980), 2 C.H.R.R. D/365. In that case, an anglophone was dismissed from his job so that the position could be filled by a francophone. The board of inquiry found that expressing preference for a francophone in addition to the requirement of being "fluently bilingual", particularly where there was no compelling job requirement for complete mastery of French, was sufficient to constitute discrimination on the basis of ancestry. In reaching this conclusion, the board stated:

> "The more difficult question is the significance of giving employment preference on the basis of whether or not a person is 'Francophone'. The *Ontario Human Rights Code* does not bar discrimination based on language. Therefore, in order to establish a contravention of the Code in a particular case, it would be necessary to demonstrate that the preference based on language extended to one of the grounds of discrimination which are prohibited by the Code. The potentially relevant ground in this case is 'ancestry'."

The board then determined that "francophone" means having French as one's "mother tongue" and continued:

> "This Board has concluded that 'mother tongue' is, in fact, closely enough associated to ancestry that to give preference in employment to a 'Francophone' *could* constitute a contravention of the *Ontario Human Rights Code* on the basis of ancestry."
>
> "... For many Canadians of French descent, exclusion based on 'mother tongue' is, effectively, discrimination based on ancestry. Surely, the intent of the *Ontario Human Rights Code* is to prohibit such effective discrimination based on ancestry even though the particular manifestation may be in language."

The alleged initial discriminatory act alleged here - the refusal to accept the cheque written in French - manifests itself solely in language. There was no convincing evidence that any of the respondents harboured an animus against persons from Québec (place of origin) or against French Canadians (ethnic origin?). There was an uncorroborated allegation by AB that other tenants of French Canadian background had been harassed and referred to as "frogs" by Mr. Clark. There was evidence that there were other French Canadian tenants in the building at various times but none were called to give evidence. In argument, counsel for the Commission took the position that French Canadians were accepted in the building but only if they did not use the French language. There was no evidence to support this submission.

The case for discrimination on the basis of ancestry, place of origin and ethnic origin is said to be buttressed by the use by Mr. Clark and Mrs. Clarke of the derogatory terms "frog" and "Frenchie" in reference to the complainant on several occasions to third parties. The case for discrimination on the basis of sexual orientation is said to be supported by the use of various derogatory epithets such as

"fag", "faggot", and "Queen" by Mr. Clark to the complainant or to third parties. There was also evidence that Mrs. Clarke called the complainant a "dirty homosexual" or a "filthy homosexual" and a "fairy" during the bicycle incident and made intrusive inquiries at various times as to the sleeping arrangements of the complainant and his roommate.

Where the case for discrimination must be based on circumstantial evidence, slurs, name-calling and derogatory comments and statements are all relevant. However, they are not determinative, especially in a situation such as this where there is clearly an atmosphere of mutual animosity stretching over a period of five years. In such circumstances, it is not surprising that the level of insults sunk to a very low level. I accept the evidence of the complainant and other Commission witnesses with respect to the use of derogatory epithets and comments but I am not persuaded that this assists greatly in determining the motive or motives behind the conduct of the respondents in this case.

Apart from the cheque incident in 1986, the complainant and his roommate testified that they were on reasonably friendly terms with Mr. Clark and Mrs. Clarke prior to November 1988. After that date, Mr. Clark and Mrs. Clarke became increasingly hostile and vindictive. It is submitted that this was because AB insisted on his right to use the French language. However, there was also the evidence of Mr. Zarzycki that he was the object of the same type of hostility and vindictiveness and subject to similar pressures with respect to termination notices and plumbing complaints during part of the same period. Ms. Starr testified that

her friendship with Mr. Clarke broke down sometime in 1991 and that she thereafter experienced hostility and vindictiveness. In addition, we have the evidence of AB, both at the hearing and his November 1988 letters, that he had become aware of Mr. Clarke and Mrs. Clark engaging in illegal acts of reprisal and threats of termination against other tenants. This evidence was introduced by the Commission under the rubric of similar fact evidence to show the nature and extent of the hostility and vindictiveness of the respondents. It may be evidence of this but it is of no assistance in connecting these activities to a prohibited ground of discrimination. There was no common thread of ancestry or sexual orientation amongst the tenants who gave such evidence or were referred to in the evidence of AB. It is of no legal value.

I am quite prepared to find on the evidence that the behaviour of Mr. Clark and Mrs. Clarke was petty and vindictive on many occasions. However, the behaviour of AB was sometimes less than exemplary and I am not prepared to accept that every event which he recounted in his evidence constituted part of an insidious plot by the respondents to terminate his tenancy.

I give little weight to the testimony of either Mrs. Clarke or Mr. Clark. The content was of minimal assistance. Considering her age, I can accept that Mrs. Clarke may have been confused as to some matters but I also feel that there is a good possibility that she was being selectively forgetful. Mr. Clark was obviously evasive and his explanations were completely unconvincing. His attempt to reconcile the various positions that he had taken in past legal proceedings respecting his position

in the management of the apartment building was totally unbelievable. If it were necessary, I would have no hesitation in finding that he was put in some position of authority by the landlord throughout the relevant period.

Considerable evidence was led by counsel for the Commission in order to establish that Mr. Clark was an "agent of the landlord" within the meaning of section 2(2) of the *Code*. The extent of this effort was of marginal significance to the case as a whole. Mr. Clark could have been held liable under this subsection (at least with respect to the ground of ancestry) merely as an "occupant of the same building". The evidence was admissible to show a link to Mr. Colloredo-Mansfeld on the issue of his possible liability. However, it now appears to me that the evidence was led primarily as a pre-emptive attack on the credibility of Mr. Clark and should more properly have been reserved for cross-examination.

Counsel for the respondents took the position that the evidence showed nothing more than a long-festering landlord and tenant dispute. In his submission, its origins related neither to the ancestry nor the sexual orientation of the complainant but to the trouble caused to the respondents by the complainant's correspondence to the other tenants of the building in November, 1988.

I am inclined to agree. In any case, I am not satisfied that the complainant has, on a balance of probabilities, met the onus of establishing that the harassment in accommodation to which he was no doubt subjected was based, even

partly, on a ground prohibited under the *Code*. For greater certainty, this conclusion applies to sexual orientation as well as ancestry, place of origin and ethnic origin.

I have reached the same conclusion with respect to reprisal. Although no argument was directed to this issue, it forms part of the Complaint. The reference to contacting the Commission contained in the letter of November 7, 1988 appears in the context of obtaining information. There was no evidence that any complaint was made at this time. A complaint is threatened in the letter to the accountants of November 17, 1988. AB testified that he contacted the Commission on or about November 21, 1988. By letter dated December 2, 1988 the Commission wrote to the accountants for the building and, presumably, Mr. Clark and Mrs. Clarke would have become aware of this from the accountants shortly after. These events took place within generally the same time period as AB's threats and complaints with respect to landlord and tenant and rent control procedures. The formal Complaint was not signed until January 19, 1990. No evidence was led which in any way connected the instances of harassment to the institution or participation of the complainant in any proceedings under the *Code* or, as I have found, to the assertion of any rights protected by the *Code*.

Although it was not referred to in argument, I have also considered the decision in *Persaud v Consumers Distributing Ltd.* (1991), 14 C.H.R.R. D/23 as possibly being relevant. That case dealt with a complaint of discrimination in employment on the basis of race, colour, ancestry, place of origin and ethnic origin and included a complaint of harassment. In the course of a dispute about work

methods, the complainant's supervisor physically assaulted him and used racial slurs. The tribunal found that, while the supervisor's motive was not racially based, his words and actions clearly had an active racial component. The tribunal stated:

> "... Racial harassment is present when one person verbally insults another person on the basis of his race, colour, ancestry and place of origin, irrespective of the underlying events that trigger the outburst. Such harassment is contrary to s. 4(2) of the *Code* and Mr. Dassy is in breach of that provision.
>
> When derogatory racial references are used between employees in the context of a heated argument or a specific dispute that is work-related and unrelated to race, as an expression of anger and frustration, such racial references constitute racial harassment. The *Nimako v Canadian National Hotels (No. 2)* (1987), 8 C.H.R.R. D/3985 (Ont. Bd. Inq., W.A. Hubbard) case, cited by the respondents, is distinguishable on the facts because in that case the racial slur was not said to the complainant (D/4005, para. 31693)."

I am unable to agree completely with such a sweeping statement. It appears to indicate that a single isolated incident of this nature would constitute harassment. The *Code* defines "harassment" as "engaging in a *course* of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".

In this case, there was evidence of slurs based on ancestry but none which were said to the complainant. There was evidence of slurs based on sexual orientation which were said to the complainant by both Mr. Clark and Mrs. Clarke - the most blatant being Mrs. Clarke's comments during the bicycle incident. These latter might, because of surrounding circumstances and their ongoing nature, have

been sufficient to constitute harassment but the absence of sexual orientation as a prohibited ground in section 2(2) of the *Code* precludes me from making any award with respect to this conduct.

We are left then with the incident of the refusal to accept the cheque in November 1988. The message left by Mrs. Clarke on the answering machine suggests two reasons for refusal. First, the cheque is not in English and, second, the cheque should have come from CD. The third basis for refusal - that some of AB's previous cheques had bounced - came later from Mr. Clark. In her evidence, Mrs. Clarke stated that she only told AB that she did not understand French and asked him to provide a cheque in English. This explanation is totally inconsistent with her taped statement. In cross-examination, counsel for the respondents suggested that AB's handwriting was almost indecipherable and anyone would have trouble determining whether the words and numbers were consistent. Mr. Clark denied any involvement in this incident. It was not contested that a similar incident had occurred in 1986 and that this had been resolved by the intervention of Mr. Colloredo-Mansfeld.

I am prepared to find that the fact that AB's cheque was written in French was a proximate cause of the refusal by Mrs. Clarke to accept it. I am also satisfied that payment of rent falls within the protection afforded by section 2(1) of the *Code*. It was the position of counsel for the respondents that Mrs. Clarke was the representative of the landlord for the purpose of collecting rent at this time. Accordingly, I find that she discriminated against AB because of ancestry. The

evidence does not satisfy me that Mr. Clark was involved in this particular incident. Likewise, I find no evidence that Mr. Colloredo-Mansfeld authorized, condoned, adopted or ratified this particular action by Mrs. Clarke so as to be liable under section 9 of the *Code* (see *Shaw v. Levac Supply Ltd.* (1991), 14 C.H.R.R. D/36 and *Fu v Ontario Government Protection Service* (1985), 6 C.H.R.R. D/2797). The comments in his letter of December 27, 1988 appear to relate to AB's tenant activist activities and he had earlier, in 1986, specifically instructed Mrs. Clarke to accept cheques written in French.

There was little emphasis put on the cheque incident by itself as a discriminatory action deserving of a remedy under the *Code* and it assumed conflicting degrees of importance in the evidence of AB. At one point, he described the refusal to accept it as a "declaration of war" over his right to write a cheque in French. In relatively contemporaneous correspondence, he had stated that he regarded the refusal to cash the cheque as "pure DISCRIMINATION". However, in other parts of this correspondence, he described the cheque as having "relative insignificance" or being a "relatively insipid affair" and focussed his attention on the real problem of the illegal and harassing practices of Mrs. Clarke and Mr. Clark in their management of the apartment building.

He testified that the concerns which led to him spending so much time educating himself on landlord and tenant and rent control procedures was inspired by the fear that the refusal to cash his cheque was the initial step in an attempt to have him and CD evicted from the building. The only explanation as to why AB

felt that they were in danger of illegal eviction was that he had heard of similar instances with respect to other tenants. However, his evidence and the correspondence of November 1988 indicate that it was subsequent to the refusal to accept the cheque that he became aware of such matters. In any event, it is clear that these were the concerns which were uppermost in his mind.

The relatively novel items for which the complainant sought compensation - such as travel expenses, legal costs of other proceedings, transcripts of other proceedings, lost time, and a rent abatement - related to the allegations of ongoing harassment. Likewise, the submissions for the claim for general damages were largely premised on the duration and nature of such harassment. The mental anguish suffered by the complainant resulted from these later incidents and the complainant's belief that they were directed at forcing him and his roommate from the apartment. Harassment was the real basis of this Complaint and I doubt that proceedings would have been commenced based on the cheque incident alone. Nevertheless, the complainant is entitled to damages for infringement of his right to be free from discrimination.

ORDER

This board of inquiry, having found that AB's right to equal treatment with respect to the occupancy of accommodation because of ancestry was infringed by Sarah Eileen Clarke contrary to section 2(1) of the *Human Rights Code,* R.S.O.

1990, c. H-19, orders that Mrs. Clarke pay to AB the sum of $300.00. In all other respects, the Complaint is dismissed.

Dated at Toronto this 15th day of November, 1994

Ronald W. McInnes
Chair